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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al. Defendants.	No. C-06-00672-VRW CLASS ACTION PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

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In support of their Motion for a Preliminary Injunction, plaintiffs Tash Hepting, *et al.* respectfully request, pursuant to Federal Rule of Evidence 201 and the inherent authority of the Court, that the Court take judicial notice of certain admissions made by the President of the United States and representatives of the President's Administration about the National Security Agency ("NSA")'s surveillance program.

Federal Rule of Evidence 201 authorizes the Court to take judicial notice of such admissions because they are "not subject to reasonable dispute in that" they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Further, the Rule mandates that judicial notice be taken where it is "requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d).

The facts for which plaintiffs request judicial notice can and should be judicially noticed because they are "not subject to reasonable dispute," as they are statements about the NSA Program that come directly from the President and his Administration. The facts are easily verifiable, as they are taken from public statements that the President and members of his administration have made to Congress and the public, either in writing or orally. The oral statements were documented in transcripts of proceedings or in media coverage of statements that the President and members of his Administration have made to the public, which plaintiffs attach to the instant request.

Many courts have taken judicial notice of the type of information at issue in the instant request. *See, e.g.*, *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n.4, 78 L. Ed. 777, 54 S. Ct. 416 (1934), amended on other grounds, 291 U.S. 649, 54 S. Ct. 525 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice of information contained in news articles); *Blair v. City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (taking judicial notice of and independent commission's report on the code of silence among police officers); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (taking judicial notice of public documents, including Senate and House Reports); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1108 (N.D. Cal. 2003) (taking judicial notice of press releases issued by the Securities and Exchange Commission); *Clemmons v. Bohannon*, 918 F.2d 858, 865

(10th Cir. 1990), vacated on other grounds, on reh'g en banc, 956 F.2d 1523 (10th Cir. 1992) (taking judicial notice of government reports and Surgeon General's reports concerning health risk of environmental tobacco smoke); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 597-98 (3rd Cir. 2000) (taking judicial notice of information in a newspaper article); *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974) , rev'd on other grounds, 524 F.2d 384 (2nd Cir. 1975) (taking judicial notice of data contained in President's Economic Report); *B.T. Produce Co., Inc. v. Robert A. Johnson Sales, Inc.*, 354 F. Supp. 2d 284, 285-86 (S.D.N.Y. 2004) (taking judicial notice of U.S. Department of Agriculture report).

The following are the facts that the President and members of his Administration have admitted to Congress and the public, of which plaintiffs request that the Court take judicial notice:

1. In the fall of 2001 the President authorized the NSA to launch a secret electronic surveillance program (the "Program").

(a) President George W. Bush, Radio Address (Dec. 17, 2005) (Attachment 1) at 1881. ("In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.")

(b) *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005) (Attachment 2). (Attorney General Gonzales: "The President has authorized a program to engage in electronic surveillance . . . .")

2. Under the Program, the NSA intercepts electronic communications.

(a) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to congressional leaders, December 22, 2005 (Attachment 3) (Assistant Attorney General William E. Moschella: "As described by the President, the NSA intercepts certain international communications. . . .")

(b) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4) (Gen. Michael Hayden, Principal Deputy Director for National Intelligence, has admitted that the Program covers "international calls".)

(c) December 19, 2005 Press Conference of President Bush, at 1889. (Attachment 5) (President Bush has noted that "calls" are intercepted.)

3. The President has reauthorized the Program more than thirty times, approximately every 45 days, based on periodic review and approval of the Program by the Attorney General and other officials. The President intends to continue reauthorizing the Program indefinitely.

(a) December 19, 2005 Press Conference of President Bush (Attachment 5) at 1885. (President Bush: "I've reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for so long as our nation is – for so long as the nation faces the continuing threat of an enemy that wants to kill American citizens.")

(b) President George W. Bush, Radio Address (Dec. 17, 2005) (Attachment 1) at 1881. ("The activities I authorized are reviewed approximately every 45 days. . . . The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.")

(c) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Senator Arlen Specter, March 24, 2006 (Attachment 6) at p. 12 (response to question 29, discussing people involved with the authorization of the Program).

4. Under the Program, the NSA conducts "electronic surveillance" as defined by the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. §1801 *et. seq*.

(a) *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (Attachment 2) (Alberto Gonzales: "[T]he Foreign Intelligence Surveillance Act . . . requires a court order before engaging in this kind of surveillance . . . unless otherwise authorized by statute or by Congress.") (emphasis added).

(b) FISA requires a court order before the government may engage in "electronic surveillance" as defined therein.

5. Under the Program, the NSA conducts surveillance that would not satisfy the standards of the FISA statute.

(a) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attachment 7), transcript at 151. (Addressing why FISA applications are not sought for surveillance under the program, "GONZALES: Well, of course, we can't begin surveillance just based on a whim by someone, say, at the FBI. There has to be a reason to believe that all of the standards of the FISA statute can be satisfied.")

(b) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4) ("NSA just can't go up on a number for 72 hours while it finishes out the paperwork. . . . So my point was that's not something that NSA, under the FISA act, can do on its own. . . . The standard the attorney general must have is that he has sufficient evidence in front of him that he believes he can substantiate that in front of the FISA court.")

6. Under the Program, the NSA intercepts communications without obtaining a warrant or any other type of judicial authorization.

(a) *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005) (Attachment 2)

(i) Michael Hayden: "The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order."

(ii) Attorney General Gonzales: "[T]he Supreme Court has long held that there are exceptions to the warrant requirement in – when special needs outside the law enforcement arena. And we think that that standard has been met here."

(b) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attachment 7), transcript at 14. (Attorney General Gonzales: "[T]he program is triggered [by] a career professional at the NSA.").

(c) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4):

QUESTION: Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, the change from going around the FISA law was to – one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it over to a shift supervisor at NSA. Is that what we're talking about here – just for clarification?

GEN. HAYDEN: ***You got most of it right***. The people who make the judgment, and the one you just referred to, there are only a handful of people at NSA who can make that decision. They're all senior executives, they are all counterterrorism and al Qaeda experts. So I – even though I – you're actually quoting me back, Jim, saying, "shift supervisor." To be more precise in what you just described, the person who makes that decision, a very small handful, senior executive. So in military terms, a senior colonel or general officer equivalent; and in professional terms, the people who know more about this than anyone else.

QUESTION: Well, no, that wasn't the real question. The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? And number two, if you could give us some idea of the genesis of this. Did you come up with the idea? Did somebody in the White House come up with the idea? Where did the idea originate from?

Thank you.

GEN. HAYDEN: Let me just take the first one, Jim. And I'm not going to talk about the process by which the president arrived at his decision.

I think you've accurately described the criteria under which this operates, and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach – limited, focused – has been effective" (emphasis added).

7. The Program has been used "in lieu of" the procedures specified under the FISA.

(a) *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (Attachment 2). Michael Hayden stated:

(i) "I can say unequivocally that we have used this program in lieu of [the FISA process] and this program has been successful."

(ii) "[T]his is a more . . . 'aggressive' program than would be traditionally available under FISA."

(iii) "What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization. Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization."

(b) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4) ("If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one FISA, one the presidential – the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason.")

8. The Administration is not using the 72 hour emergency exception to FISA, 50 U.S.C. §1805(f), to conduct the Program.

(a) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attachment 7), transcript at 18. (Attorney General Gonzales: "In this debate, however, I have been concerned that some who've asked, "Why not FISA?" do not understand how that statute really works. To be sure, FISA allows the government to begin electronic surveillance without a court order for up to 72 hours in emergency situations or circumstances [but this] requirement can be cumbersome and burdensome. . . .")

9. Under the Program, an NSA "shift supervisor" is authorized to approve interceptions of communications without need for specific approval from the President, the Attorney General or any judicial authority.

(a) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4) ("These are communications that we have reason to believe are al Qaeda communications: a judgment made by American intelligence professionals, not folks like me or political appointees.")

(b) Michael Hayden, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (Attachment 2) (explaining that the judgment to target a communication "is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply – and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States")

(c) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Senator Arlen Specter, March 24, 2006 (Attachment 6) at p. 8 (response to question 29, discussing who decides if the Administration's "reasonable basis" test is met).

(d) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attachment 7) (Attorney General Gonzales:

(i) "[T]he program is triggered [by] a career professional at the NSA." Tr. at 14.

(ii) "The decision as to which communications will be surveilled are made by intelligence experts out at NSA." Tr. at 42.

10. The Program "is a more . . . 'aggressive' program than would be traditionally available under FISA," in part because "[t]he trigger is quicker and a bit softer than it is for a FISA warrant."

(a) Michael Hayden, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (Attachment 2).

(b) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4). ("In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us.")

(c) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to congressional leaders, December 22, 2005 (Attachment 3) ("[T]he President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system.").

11. Under the Program, communications are intercepted without probable cause to believe that the surveillance targets have committed or are about to commit any crime, or are foreign powers or agents thereof. Instead, the NSA claims to intercept communications when the agency has, in its own judgment, a "***reasonable basis to conclude*** that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda," as well as the communications of individuals it deems suspicious on the basis of its belief that they have some unspecified "link" to al Qaeda or a related terrorist organization, or "want to kill Americans." Put another way, when the NSA believes there is "[i]nherent foreign intelligence value."

(a) Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (Attachment 2) ("[W]e have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.").

(b) Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006) (Attachment 4)

(i) Hayden explained that the NSA intercepts calls that "we have a reasonable basis to believe involve al Qaida or one of its affiliates."

(ii) "We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans."

(iii) "Inherent foreign intelligence value is one of the metrics we must use to ensure that we conform to the Fourth Amendment's reasonableness standard when it comes to protecting the privacy of these kinds of people."

(c) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee,* 109th Congress (Feb. 6, 2006) (Attachment 7), transcript at 123. (Attorney General Gonzales: "I think it's probable cause. But it's not probable cause as to guilt. . . . Or probable cause as to a crime being committed. It's probable cause that a party to the communication is a member or agent of al Qaida. The precise language that I'd like to refer to is, 'There are reasonable grounds to believe that a party to communication is a member or agent or al Qaida or of an affiliated terrorist organization.' It is a probable cause standard, in my judgment.").

(d) President George W. Bush, Radio Address (Dec. 17, 2005) (Attachment 1) at 1881. ("Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.")

(e) Dec. 19, 2005 Press Conference of President Bush, (Attachment 5) at 1885. ("I authorized the interception of international communications of people with known links to al Qaeda and related terrorist organizations.").

12. Information collected under the Program is retained and disseminated, even when such information is about an American and gives no indication that the individual is involved in terrorism.

(a) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attachment 7), transcript at 51-52:

> SENATOR KOHL: If the administration investigates an American for terrorism using this program and finds nothing . . . then what is done with the information collected? Does the administration keep this information on file somewhere? Is it disposed of? What happens with this information?
>
> ALBERTO GONZALES: . . . In terms of what is actually done with that information, . . . information is collected, information is retained and information is disseminated. . . ."

(b) Michael Hayden, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005) (Attachment 2)

> GENERAL HAYDEN: "If this particular line of logic, this reasoning that took us to this place proves to be inaccurate, we move off of it right away.
>
> Q: Are there cases in which –
>
> GENERAL HAYDEN: Yes, of course.
>
> Q: Can you give us some idea of percentage, or how often you get it right and how often you get it wrong?
>
> GENERAL HAYDEN: No, . . . I cannot, without getting into the operational details.

13. The Administration has not denied that the warrantless surveillance operations may extend beyond the conduct that the President has already publicly acknowledged.

(a) *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the Senate Judiciary Committee,* 109th Congress (Feb. 6, 2006), (Attachment 7), transcript at 117:

> SCHUMER: OK. Good. Now, here's the next question I have: Has the government done this? Has the government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?
>
> GONZALES: To my knowledge, that has not happened under the terrorist surveillance program, and I'm not going to go beyond that.
>
> SCHUMER: I don't know what that – what does that mean, under the terrorist surveillance program? The terrorist surveillance program is about wiretaps. This is about searching someone's home. It's different. So it wouldn't be done under the surveillance program. I'm asking you if it has been done, period.
>
> GONZALES: But now you're asking me questions about operations or possible operations, and I'm not going to get into that, Senator.

(b) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Senator Arlen Specter, March 24, 2006 (Attachment 6) at pp. 13-14. (response to questions 34 and 35, refusing to "provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program, though our inability to respond should not be taken to suggest that there are such activities.").

(c) Alberto Gonzales, Letter to Senator Arlen Specter (February 28, 2006) (Attachment 8) (In reference to his original statement (quoted below) at the February 6, 2006 hearing that "I've tried to outline for you and the committee what the president has authorized, and that is all that he has authorized," Attorney General Gonzales writes: "I did not and could not address . . . any other classified intelligence activities . . . I was confining my remarks to [the Program] as described by the President, the legality of which was the subject. . . .")

(i) *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006), (Attachment 7), transcript at p. 27:

> SPECTER: Well, then, let me ask you this.

> Under your interpretation of this, can you go in and do mail searches? Can you go into e-mails? Can you open mail? Can you do black-bag jobs?
>
> And under the idea that you don't have much time to go through what you described as a cumbersome procedure, what most people think is a pretty easy procedure, to get a FISA warrant, can you go and do that of Americans?
>
> GONZALES: Sir, I've tried to outline for you and the committee what the president has authorized, and that is all that he has authorized.

Plaintiffs Tash Hepting, *et al.* further request, pursuant to Federal Rule of Evidence 201 and the inherent authority of the Court, that the Court take judicial notice of the following public documents, copies of which are attached hereto, which verify the above-listed facts:

1. President Bush, Radio Address (Dec. 17, 2005);

2. Alberto Gonzales and Michael Hayden, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005;

3. Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to congressional leaders, December 22, 2005;

4. Michael Hayden, Remarks at the National Press Club on NSA Domestic Surveillance (Jan. 23, 2006);

5. President Bush, Press Conference (Dec. 19, 2005); and

6. Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Senator Arlen Specter, March 24, 2006.

7. *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006);

8. Letter from Alberto Gonzales to Senator Arlen Specter (February 28, 2006)

DATED: March 31, 2006

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I, Reed R. Kathrein, am the ECF User whose ID and password are being used to file this PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE. In compliance with General Order 45, X.B., I hereby attest that Cindy Cohn has concurred in this filing.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via FedEx to the non-CM/ECF participants indicated on the attached Manual Notice List.

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Manual Notice List

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